No. 21,075

IN THE

United States Court of Appeals

For the Ninth Circuit

LUIS P. UNTALAN, as administrator of the Estate of Trinidad T. Calvo, deceased, and LUIS P. UNTALAN, as ancillary administrator of the Estate of Ismael T. Calvo, deceased, and VICENTA T. CALVO,

Appellants,

vs.

PAUL M. CALVO, PAUL M. CALVO, as administrator of the Estate of Eduardo T. Calvo, deceased, EDWARD M. CALVO, THOMAS J. M. CALVO, VERONICA M. CALVO and RICARDO T. CALVO,

Appellees.

BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND QUESTIONS PRESENTED

This action was commenced by the filing of a most complex complaint, drafted in a quite unorthodox fashion, which complaint on its face stated two causes of action between two separate sets of plaintiffs and two separate sets of defendants, both causes of action

concerning unrelated transactions. Upon motion the complaint was amended, but unfortunately the amended complaint contained all of the same defects noted above. One facet of the complaint indicates laches continuing over a period of years; the other facet demonstrates that the statute of limitations has run.

The trial Court could have made appropriate orders pertaining to this confused complaint but chose instead to require defendants to answer the amended complaint, indicating that the problems complained of by defendants could be ironed out at a pre-trial conference. The pre-trial conference was conducted on April 8, 1966 and the Court entered its pre-trial order, from which plaintiffs now appeal, on April 11, 1966.

Defendants differ with plaintiffs as to the pertinent questions now before this Court. It is defendants' contention that the only question is whether or not, under the law and the Federal Rules of Civil Procedure, the pre-trial order of the District Court of Guam of April 11, 1966 constituted an appealable order as defined in Section 1292, 28 U.S.C.A., or whether it was a final judgment from which an appeal could be taken.

SUMMARY OF ARGUMENT

Plaintiffs have elected to appeal the pre-trial order of the District Court of Guam of April 11, 1966, to this Court. Defendants contend that this appeal cannot lie for the following reasons:

I. The pre-trial order of April 11, 1966 is not an appealable order within the contemplation of Section 1292, Title 28 U.S.C.A.

II. Said pre-trial order is not a final judgment from which an appeal can be taken as contemplated by the Federal Rules of Civil Procedure.

III. Plaintiffs had an appropriate remedy under Rule 54 of the Federal Rules of Civil Procedure to move for judgment upon the pre-trial order if they felt the order was an adjudication of the case on its merits, and under Rule 54(b) of the Federal Rules of Civil Procedure, they could have moved the Court for a judgment of dismissal as to Count II and a certification under the rule permitting appeal.

IV. There was a fatal misjoinder of parties plaintiff and defendant.

ARGUMENT

I.

THE PRE-TRIAL ORDER OF APRIL 11, 1966 IS NOT AN APPEALABLE ORDER WITHIN THE CONTEMPLATION OF SECTION 1292, TITLE 28 U.S.C.A.

Section 1292 states:

Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the Dis-

trict Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The relief sought by plaintiffs in their amended complaint does not fall into any of the approved categories mentioned above. On April 11, 1966, the trial Court made its pre-trial order remanding this action to the Island Court of Guam, sitting in Probate, and in its discussion gave most convincing reasons as to why this should be done. Further, the District Court kept the door open in the event the probate Court found that further relief should be sought in the existing action as it pertains to Count I of the amended complaint.

We must remember the hierarchy of the civil Courts of Guam and their interdependence. The jurisdiction of the District Court of Guam as it pertains to this case is set out in Section 1424(a), Title 48 U.S.C.A., as follows:

> *District Court of Guam; jurisdiction; rules of procedure*
>
> (a) There is created a court of record to be designated the "District Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have, in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in section 451 of Title 28, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate juris-

> diction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam.

It is to be noted that the District Court of Guam was given all jurisdiction in Guam except that which the local legislature took away and reserved to inferior Courts created by it. Thus we have these expressions of the Guam Legislature:

> Section 62, *Code of Civil Procedure of Guam. Original jurisdiction.*
>
> Under Section 22(a) of the Organic Act of Guam the District Court of Guam has the original jurisdiction of a district court of the United States in all causes arising under the laws of the United States and has original jurisdiction in all other causes in Guam except those over which original jurisdiction has been transferred to and vested in the Island Court by Section 82 of this title. If it appears that an action or proceeding brought in the District Court is actually within the jurisdiction of the Island Court the District Court shall transfer it to the Island Court for hearing and determination.
>
> Section 82, *Code of Civil Procedure of Guam. Original jurisdiction.*
>
> The Island Court shall have original jurisdiction exclusive of the District Court:
>
> 1. . . .
>
> 2. . . .
>
> 3. In all proceedings under the laws of Guam for the probate of wills, the appointment of ex-

> ecutors, administrators, guardians and trustees, and the administration, settlement and distribution of estates of decedents, minors and missing persons;

In addition, the District Court of Guam sits as the Appellate Court for the Island Court.

In the present case the District Court found jurisdiction to be in the Island Court sitting in probate. Its order called for judicial functions to be performed by the Island Court as a precedence to further action by it. An analogy may be drawn from the opinion of the Court in *Lewis M. Alexander et al. v. The United States of America,* 26 S. Ct. 356, 201 U.S. 117, 50 L. Ed. 686, which states:

> Orders of a Federal Circuit Court directing witnesses to answer the questions put to them, and produce written evidence in their possession, on their examination before a special examiner appointed in a suit brought by the U. S. to enjoin an alleged violation of the anti-trust act of July 2, 1890, (. . .), *lack the finality* requisite to sustain an appeal to the Supreme Court (emphasis supplied).

II.

Even conceding that the District Court of Guam abused its discretion in remanding this case to the probate department of the Island Court, such remand would not have the force of a judgment from which an appeal would lie. Under the Federal Rules of Civil Procedure, pre-trial conference procedure is encouraged in order to simplify issues and expedite case

handling. In *O'Malley v. Chrysler Corporation,* 160 F.2d 35, the Court said:

> Under these rules we think the court has wide discretion and power to advance the cause and simplify the procedure before the cause is presented to the jury. The District Court has the power to issue such orders as in the exercise of sound discretion would advance and simplify the cause before trial. If it abuses that discretion in making such orders it is conceded that no appeal would lie under Section 128 and there would be nothing final about such orders. In our opinion the order made in the instant case was such an order. It was only a step in the *orderly procedure* of the case (emphasis supplied). The District Court was exercising its pre-trial powers. It would, in our opinion, have had the *power* to make the order it made irrespective of the Federal Rules of Civil Procedure.

Again, analogies can be drawn. In the case of *Latta v. Kilbourn,* 150 U.S. 524, the Court entered a decree on an accounting action determining the rights of the parties and referring the case to an auditor in order that an account might be stated upon which a further decree could be entered. The Court above held that this was not a final appealable decree in the language following:

> It is first contended on behalf of the appellees that this appeal cannot be entertained by this court for reason that the decree of October 27, 1886 was the final decree in the cause from which an appeal should have been taken. We are clearly of the opinion that this position cannot be sustained. It is well settled by the decisions of this

> court that where the purpose of the suit is to attain an account, such as that prayed for by the bill in this case and directed by the order of October 27, 1886, the decree is of such an interlocutory character that no appeal will lie therefrom . . .

In the *Latta* case, above, the Court also referred to *McGourkey v. Railway Company,* 146 U.S. 544, wherein the authorities are thoroughly reviewed as to what constitutes a final decree. It was stated therein that as a general rule, if the Court makes a decree fixing the rights and liabilities of the parties and thereupon refers the case to a master for a ministerial purpose only, and no further proceedings in Court are contemplated, the decree is final; but if the case is referred to the master for a judicial purpose, as to set an account between the parties upon which a further decree is to be entered, then the decree is not final.

A further clear expression of the point is in *Karl Kiefer Machinery Co. v. U. S. Bottlers Machinery Co.,* 108 F.2d 469:

> The words "final decisions" mean the same thing as "final judgments and decrees." A final decree or judgment is one that puts an end to the controversy between the parties litigant. *Merriman v. Chicago & E.I.R. Co.,* 64 F. 535.

And, in *United States Sugar Corporation v. A.C.L. Railway Co.,* 196 F.2d 1015, the Court stated:

> Only "final decisions" are reviewable. A judgment is "final" for purposes of appeal only when it

determines the litigation on the merits, leaving nothing to be done but to enforce the judgment. *Lewis v. E.I. DuPont DeNemours & Co.,* 183 F.2d 29, 21 A.L.R. 2d 757. The order appealed from does not terminate the litigation, but allows defendant to plead further. It grants no relief to the plaintiff nor any against the defendant. There were other issues of fact in the case that had to be determined before final judgment can be entered. The order is clearly interlocutory, not a final decision, and is therefore not appealable.

Finally:

A judgment which does not dispose of all the issues, but which is but a step toward a final hearing and decision, is not appealable (*Arnold v. Guimarin,* 263 U.S. 427, 68 L.Ed. 371, 44 S.Ct. 144; *Rexford v. Brunswick-Balke-Collender Co.,* 228 U.S. 339, 57 L.Ed. 864, 33 S.Ct. 515,) as where it leaves undetermined matters within the pleadings and retains the cause for the purpose of thereafter passing upon them and for the entry of a further judgment. (*City of Paducah, Kentucky v. East Tennessee Tel. Co.,* 229 U.S. 476, 57 L. Ed. 1286, 33 S.Ct. 816.) If the decision or judgment leaves some matter involved in the controversy open for future hearing and determination before the ultimate rights of the parties are conclusively adjudicated, it is interlocutory and not final. (*Smith v. Benedict,* 279 F.2d 211; *School Dist. No. 5 v. Lundgren,* 259 F.2d 101; *Phelan v. Middle States Oil Corp.,* 210 F.2d 360.) The principle has been laid down that, where the court has power to further review its judgment, the judgment is not final so long as it is being considered by the court. (*Suggs v. Mutual Benefit Health &*

Accident Ass'n, 115 F.2d 80.) It makes no difference whether the attention of the court is directed to a further consideration of its judgment by a pleading filed as a matter of right, or by a pleading which has no standing in the case as a matter of law, or springs from the court itself. The fact that the court expresses an intent to further consider the judgment prevents its finality. (*Suggs v. Mutual Benefit Health & Accident Ass'n,* 115 F.2d 80.) Cyc. Fed. Proc. 3d 13, Rev. Judgm'ts, § 57.20, pp. 118-119.

III.

It is elementary that federal policy is against piecemeal appeals. However, in the event that a party feels aggrieved as did plaintiffs here, at the trial Court's ruling in its pre-trial order, said aggrieved party is under the obligation to take certain interim steps to determine whether appeal will lie at the interim stage of proceedings. To this end, plaintiffs, instead of pursuing an appeal from the pre-trial order, should have moved the trial Court for entry of judgment based upon the pre-trial order, or any part of it that they considered to be a final determination. This is especially true in view of plaintiffs herein having determined themselves that Count II of the amended complaint had been dismissed by the pre-trial order. Rule 54(b) required plaintiffs to seek a certification from the trial judge and the failure to do so makes this appeal premature, even if it could lie for other reasons. Where an appeal has been taken prematurely and no attempt is made to correct the initial fatal deficiency, the deficiency will not correct itself. This

is demonstrated by the recent case in this circuit, upon appeal from Guam, of *Maddox v. Black, Raber-Kief & Associates,* 303 F.2d 910. In that case the District Court of Guam made an order on June 9, 1961. Further proceedings were had toward a new trial and vacation of judgment, but actually findings of fact, conclusions of law and judgment were not filed until June 22, 1961. Subsequently, appellants, on August 25, 1961, filed its notice of appeal "from the judgment entered in this action on June 8, 1961. . . ." This was the only notice of appeal given in this case and this Court found it insufficient. If appellants, in the instant case, for any reason, had any right of appeal based on the pre-trial order of April 11, 1966, they failed to perfect those rights.

IV.

The trial Court found in its pre-trial order that there had been a misjoinder of parties and causes of action, which appellant parties agreed with in their brief (Appellants' Brief, p. 16, para. 7). However, appellants have missed the point that not only did they have a misjoinder of parties, both plaintiff and defendant, but that they also had a misjoinder of causes of action. It is to be noted that Rule 21 of the Federal Rules of Civil Procedure permits the dropping of parties or the severance of claims. In essence, the trial Court attempted to clear up the situation at least partly in its pre-trial order by dismissing Count II of the amended complaint and advising appellants that that count would have to be filed as a separate complaint at such time as it again came before this

Court. While the rules generally have been slanted to make it easier for Courts to cure misjoinder of parties or causes and to separate them, there are still instances such as this where the misjoinder is so complete that one or another set of litigants will be required to start over. This is well illustrated by the case of *Erwin v. City of Dallas,* 85 F.Supp. 103, which was a case wherein plaintiffs sought to restrain the city from refusing to grant beer licenses to the plaintiffs. The Court found that there was a misjoinder of parties plaintiff where there was no relationship whatsoever between them, they were separate individuals, and they were not connected in any way in business; and where the place of business of one was not in the neighborhood of that of either of the others; and where the facts were quite different.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the pre-trial order of April 11, 1966 should stand, and that appellants should be required to conform thereto.

Dated, Agana, Guam,
January 5, 1967.

Respectfully submitted,
E. R. Crain,
Attorney for Appellees.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. R. Crain,
Attorney for Appellees.